85-1738

Supreme Court, U.S.
FILED
APR 4 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO.

IN THE SUPREME COURT OF THE UNITED STATES

APRIL TERM, 1986

VICTOR L. GANOE, THOMAS A. GANOE, EDWIN A. GANOE, DANIEL K. GANOE, SANDRA I. GANOE COLLAR, MARY GANOE PRICE, CHERIE GANOE LODESTRO and CLEO GANOE SMITH

Petitioners

VS.

GEORGE F. NEFF, INDEPENDENT EXECUTOR OF THE ESTATE OF ANNETTE GANO LUMMIS, DECEASED

AND

WILLIAM LUMMIS, TEMPORARY ADMINISTRATOR OF THE ESTATE OF HOWARD ROBARD HUGHES, JR.

Respondents

PETITION FOR A WRIT OF CERTIORARI

FROM THE SUPREME COURT OF THE STATE OF TEXAS

RICHARD D. GRISANTI
Attorney for Petitioners
Office & P.O. Address
577 Niagara Street
Buffalo, New York 14201
(716) 883-0400

QUESTION PRESENTED FOR REVIEW

Was it a violation of due process under the Fifth and Fourteenth Amendments of the Constitution to deprive the Petitioners of a full hearing on appeal although the Notice of Appeal was timely filed but, according to the dismissal orders, a $1,000.00 appeal bond was filed two days late.

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NO.

IN THE SUPREME COURT OF THE UNITED STATES

APRIL TERM, 1986

VICTOR L. GANOE, THOMAS A. GANOE, EDWIN A. GANOE, DANIEL K. GANOE, SANDRA I. GANOE COLLAR, MARY GANOE PRICE, CHERIE GANOE LODESTRO and CLEO GANOE SMITH

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GEORGE F. NEFF, INDEPENDENT EXECUTOR OF THE ESTATE OF ANNETTE GANO LUMMIS, DECEASED

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Respondents

PETITION FOR A WRIT OF CERTIORARI

FROM THE SUPREME COURT OF THE STATE OF TEXAS

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

PRAYER (con't)

The Petitioners, respectfully pray that a Writ of Certiorari issue to review the Order of the Court of Appeals, State of Texas dismissing the appeal and the Order of the Supreme Court, State of Texas denying the Writ of Error herein.

OPINION BELOW

The Supreme Court of Texas refused Petitioners' application for writ of error on February 26, 1986. (Appendix A). On November 8, 1985, the Court of Appeals, Fourteenth Supreme Judicial District, Houston, Texas dismissed the Appeal herein from an Order of Hon. PAT GREGORY, Probate Court No. 2, Harris County, Texas, which was signed August 30, 1985, (Appendix B).

JURISDICTION

The jurisdiction of this Court is invoked under Ammendment V and XIV of the United States Constitution in view of the fact that the Petitioners were denied their right to "due process of law" by both the Court of Appeals and the Supreme Court of the State of Texas.

The Court of Appeals, Fourteenth Supreme Judicial District, Houston, Texas on November 8, 1985, dismissed the Appeal on the grounds that while the Notice of Appeal was timely filed the $1,000.00 bond required on Appeal was filed two days late; that the Supreme Court of Texas dismissed a Writ of Error on February 26, 1986.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Texas Rules of Civil Procedure, Rule 21 (a)

NOTICE:

...Whenever a Party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a Notice or other paper upon him and the notice or paper is served upon him by mail, three days shall be added to the prescribed period.

Texas Rules of Civil Procedure, Rule 356

TIME FOR PERFECTING APPEAL:

A) When a bond for costs on appeal is required, the bond or affidavit in lieu thereof shall be filed with the Clerk within 30 days after the judgment is signed or within 90 days after the judgment is signed if a timely motion for a new trial has been filed by any party. If

a deposit of cash is made in lieu of bond the same shall be made within the same period.

Texas Rules of Civil Procedure, Rule 5

ENLARGEMENT:

When by these rules or by notice given thereunder or by Order of Court an act is required or allowed to be done at or within a specified time the Court for good cause shown may at any time in its discretion (a) with or without motion or notice, order the period enlarged if application therefor, is made before the expiration of the period originally prescribed or as extended by the previous order...

United States Constitution, Amendment V:

"... nor ... compelled ... to be a witness against himself, nor be deprived of ... property without "due process of law" ....

United States Constitution, Amendment XIV

"No State shall ... abuse the privileges or immunities of citizens... or... deprive any person of life, liberty, or property, without "due process of law"; nor denied any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Originally a Motion was made before HON. PAT GREGORY, Probate Court Judge No. 2, Houston, Texas to set aside and reopen Heirship proceedings in the Estate of HOWARD ROBARD HUGHES, JR.; the said Heirship proceedings culminated in orders determining Heirs granted on the 13th day of November, 1981, in the Probate Court of Houston, Texas and the other entered in the Probate Court of Las Vegas, Nevada, on the 4th day of January, 1983; that the said Petitioners herein base their motion upon the fact that they were not legally and properly notified of said Heirship Hearings.

That by Decision of August 16, 1985, (see Appendix C), said Judge ruled that the Petitioners did not receive legally, sufficient notice and reopened the Heirship Proceedings for a Hearing on Petitioner's relationship to the Deceased, but at the same time granted a cross-motion

for Summary Judgment to the Respondents, herein ruling, as a matter of law, that the said Petitioner's were not sufficiently close relatives to said Decedent. This Decision was embodied in an Order signed August 30, 1985, (see Appendix C).

That an Appeal was taken to the Court of Appeals from said Order and while the Notice of Appeal was filed within 30 days of the signing of said Order, the $1,000.00 Bond on Appeal was not filed until two days past the 30 days of such signing. A motion was made by the Respondents to dismiss said Appeal because of the Bond being filed two days late; and said Motion was granted and the Appeal therein dismissed.

That an Application for a Writ of Error was made before the Supreme Court, State of Texas, setting forth the jurisdiction of that Court as well as pointing out the error committed by the Court of Appeals, in

dismissing the Appeal; that Court dismissed the Writ on February 26, 1986.

REASON FOR GRANTING THE WRIT

"DUE PROCESS" DICTATES THAT DUE NOTICE BE GIVEN OF A JUDGMENT OR ORDER TO AT LEAST THE LOSING PARTY BEFORE THE TIME FOR APPEAL BEGINS TO RUN.

"DUE PROCESS" FURTHER DICTATES THAT PETITIONERS SHOULD NOT BE DENIED THEIR RIGHT TO APPEAL WHERE THE NOTICE OF APPEAL UNDER STATE RULES WAS DULY FILED, BUT A $1,000.00 BOND WAS NOT FILED UNTIL 32 DAYS AFTER THE SIGNING OF THE ORDER APPEALED FROM, ALTHOUGH WITHIN 30 DAYS OF SERVICE OF SAID ORDER.

THE SUPREME COURT AND THE COURT OF APPEALS, STATE OF TEXAS ERRED IN DISMISSING THE APPEAL HEREIN AND VIOLATED THE PETITIONERS' CONSTITUTIONAL RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

That Appendix D, Exhibit "1" and "2" indicate that Counsel was not served with a copy of the Judgment herein until it was sent to him September 4, 1985, by certified mail;

that this means Counsel did not receive same before September 5, 1985; further, ANDREWS & KURTH, Esq's., retained local Counsel, that is PHILLIPS, LYTLE, HITCHCOCK, BLAINE & HUBER; of Buffalo, New York; that looking at Appendix D, Exhibit "3", local Counsel also served Counsel with a copy of the same Judgment, sending theirs out on September 5, 1985; that Appendix C shows a copy of the judgement sent to Councel and not certified until September 3, 1985.

That besides the confusion as to which Attorneys were responsible for the service of said Judgment, from the attached Exhibits, it is clear that the Appeal Bond herein, filed on October 2, 1985, is timely.

Further, Rule 21(a) of the Texas Rules of Civil Procedure, states as follows;

> "Whenever A Party had the right or is required to do some act or take some proceedings within a prescribed period

after the service of a notice or other paper upon him, and the notice or paper is served upon him by mail, three days shall be added to the prescribed period."

While the literal wording of Rule 355 (see also Rule 356) states the time for filing the Bond is 30 days from the time the Order is signed, Counsel submits that the requirement must be interpreted with proper notice under the "due process clause" of the United States and State Constitutions. Proper notice of the granting of the Judgment must be given to Counsel before the 30 days is to run; otherwise, how would he know when the order or judgment was granted and when the 30 days would commence running?

Opposing Counsel further argues that under Rule 5 there is a 10 day grace period if the Bond is sent to the proper Clerk, by first class mail and is received not more than 10 days late; that the requirement of

first class mail, under said rule is a minimum one; that certainly if Counsel chooses to go beyond that minimum and actually have an individual personally deliver the Bond to the Clerk, and in person have it stamped "Received", Counsel is sure the Court would agree that compliance has been made over and above what is provided under said Rule.

That under Rule 5 the Court, at any time, can issue an Order, in its discretion, enlarging the period with or without a motion or notice of good cause shown; that Counsel submits that he sent instructions to the Lovett Agency on September 30, 1985, by Express Mail from Buffalo to Houston, Texas, as shown by Appendix D, Exhibit 4 and 5, that Counsel wished also to point out that the Notice of Appeal was duly filed within 30 days of the signing of the Order and further, that Counsel's office is approximately 2,000 miles from Houston, Texas.

CONCLUSION

For the above reasons Petitioners' pray that the Writ herein be granted.

Respectfully submitted,

RICHARD D. GRISANTI
Attorney for Petitioners
Office & P.O. Address
577 Niagara Street
Buffalo, New York 14201
(716) 883-0400

APPENDIX A

SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
Mary M. Wakefield, Clerk

FEBRUARY 26, 1986

Mr. Richard Grisanti
577 Niagara Street
Buffalo, N.Y. 14201

Mr. Thomas L. Schubert
Andrews & Kurth
4200 Texas Commerce Tower
Houston, Texas 77002

RE: Case No. C-4953

STYLE: VICTOR L. GANOE ET AL.
v GEORGE F. NEFF, INDEPENDENT
EXECUTOR OF THE ESTATE OF

Dear Counsel:

Today, the Supreme Court of Texas dismissed for want of jurisdiction the the application for writ of error in the above referenced case.

Respectfully yours,

Mary M. Wakefield, Clerk

/s/ Blanca E. Molin
Deputy

APPENDIX B

Court of Appeals
First Supreme Judicial District
1307 San Jacinto, 10th Floor
Houston, Texas 77002

November 8, 1985

Hon. Richard D. Grisanti
Attorney at Law
577 Niagara Street
Buffalo, N.Y. 14201

Hon. Thomas L. Schubert
Andrews & Kurth
4200 Texas Commerce Tower
Houston, Texas 77002

RE: CASE NO. 01-85-00896-CV

STYLE: Ganoe, Victor L., et al
V: George F. Neff, Ind. Exec. of the Estate of Annette Lummis

Appellee's motion to dismiss has this day been received and filed in the referenced cause.

Respectfully yours,

Kathryn Cox
Clerk of the Court

/s/ Karma Waterman
Deputy

APPENDIX C

PAT GREGORY
PROBATE JUDGE
HARRIS COUNTY PROBATE COURT NO. 2
506 FAMILY LAW CENTER BLDG.
1115 CONGRESS AVENUE
HOUSTON, TEXAS 77002-1989
PHONE 221-6090

August 16, 1985

Mr. Thomas L. Schubert
Andrews & Kurth
4200 Texas Commerce Tower
Houston, Texas 77002

Mr. Richard Grisanti
Attorney at Law
577 Niagara Street
Buffalo, N.Y. 14201

Re: Cause No. 139,362
Estate of Howard Robard Hughes, Jr.,
Deceased

Gentlemen:

Judge Gregory has made the following findings in connection with the Motion to Set Aside Determination of Heirship filed by Mr. Grisanti and on the Motion for Summary Judgment filed by George F. Neff, Independent Executor of the Estate of Annette Gano Lummis, Deceased.

The Court will enter the following findings:

1. That Mr. Grisanti's clients had actual notice of the heirship trial but not statutory notice, therefore the Court will re-open the material heirship proceedings for the limited purpose to heirship proceedings for the limited purpose to determine if Mr. Grisanti's clients have a superior claim under the heirship statutes to those persons previously determined to be maternal heirs.

2. That the Motion for Summary Judgment filed by George F. Neff, Independent Executor of the Estate of Annette Gano Lummis, Deceased, pursuant to Rule 166-A, Texas Rules of Civil Procedure, should be granted as there are no disputed material issues of fact.

3. That the costs of these proceedings are to be taxed against Mr. Grisanti's clients.

By this letter, counsel for George F. Neff, Independent Executor of the Estate of Annette Gano Lummis, Deceased, Mr. Thomas L. Schubert is requested to prepare an order pursuant to the above and circulate it for Mr. Grisanti's approval as to form.

Sincerely yours,

/s/ John A. Hutchison, III
Administrative Assistant

JAH/bm

442837

665-01-0930

NO. 139,382

IN RE ESTATE OF
HOWARD R. HUGHES, JR.
DECEASED

IN THE PROBATE
COURT NO. 2
OF HARRIS COUNTY,
TEXAS

JUDGMENT

BE IT REMEMBERED that on the 2nd day of August, 1985, came on to be heard the Motion to Set Aside Determination of Heirship filed on behalf of Movants, Victor L. Ganoe, Thomas A. Ganoe, Edwin A. Ganoe, Daniel K. Ganoe, Sandra L. Ganoe Collar, Mary Ganoe Price, Cherie Ganoe LoDestro and Cleo Ganoe Smith, all of whom appeared by and through their attorney of record, Mr. Richard D. Grisanti, and Victor L. Ganoe appeared personally and further came the Respondent, George F. Neff, Independent Executor of the Estate of Annette Gano Lummis, Deceased, by and through his attorney of record;

And the Court after considering the motion as well as the response thereto including affidavits, responses to interr-ogatories, responses to requests for admissions, briefs and arguments of counsel and the entire record in this cause, finds that the Movants had actual notice of the Texas heirship trial and that the Movants did not receive statutory notice of the Texas heirship trial:

Accordingly, the Court orders that the maternal heirship proceeding be reopened for the sole and limited purpose only of determining whether the Movants have a claim under the Texas heirship statutes that is superior to those persons previously determined to be maternal heirs in this Court's Judgment respecting heirship dated November 13, 1981.

And further then came on to be heard the Motion for Summary Judgment filed by George F. Neff, Independent Executor of the Estate of Annette Gano Lummis, Deceased, against Victor L. Ganoe, Thomas A. Ganoe, Edwin A. Ganoe, Daniel K. Ganoe, Sandra I. Ganoe Collar, Mary Ganoe Price, Charles Ganoe LoDestro and Cleo Ganoe Smith reguarding their claim of heirship.

It appearing to the Court that the motion for summary judgment having been made in proper form and time and that proper service of said motion has been made and the Court having considered the summary judgment proof herein including the motion, reply thereto, the response to the reply, the pleadings, the depositions, answers to interrogatories, admissions and affidavits on file herein as well as the argument of counsel, the Court finds and concludes that there is

no genuine issue of any material fact and that movant is entitled to judgment as a matter of law.

It is therefore ORDERED, ADJUDGED AND DECREED that Victor L. Ganoe, Thomas A. Ganoe, Edwin A. Ganoe, Daniel K. Ganoe, Sandra I. Ganoe Collar, Mary Ganoe Price, Cherie Ganoe LoDestro and Cleo Ganoe Smith take nothing on their claims of heirship, and costs applicable to such claims are hereby taxed against them.

SIGNED this the 30 day of August, 1985.

/s/ Pat Gregory
JUDGE PRESIDING

APPPROVED AS TO FORM ONLY

RICHARD D. GRISANTI
577 Niagara Street
Buffalo, New York 14201

ATTORNEY FOR GANOES

FILED

1985 AUG 30 AM 9:33

/s/ Anita Rodeheaver

County Clerk
Harris County, Texas

665-01-0932

/s/ Thomas L. Schubert
TBA No. 17821000
Andrews & Kurth
4200 Texas Commerce Tower
Houston, Texas 77002

ATTORNEYS FOR GEORGE F.NEFF,
Independent Executor of the
Estate of Annette Gano Lummis, Deceased

CERTIFIED COPY CERTIFICATE
STATE OF TEXAS
COUNTY OF HARRIS

The above is a full, true and correct photographic copy of the original record now in my lawful custody and possesion, as the same is recorded in the Official Public Records of Probate Courts in my office and Preserved on Microfilm, and having Microfilm Identification Number as stamped thereon, I hereby certify on

SEP 3 1985

ANITA RODEHEAVER
COUNTY CLERK
HARRIS COUNTY, TEXAS

By /s/ Karen Harrison
Deputy

APPENDIX D

Exhibit 1

ANDREWS & KURTH
ATTORNEYS
TEXAS COMMERCE TOWER
HOUSTON, TEXAS 77002
(713) 220-4200
TELEX: 79-1208

September 4, 1985

BY CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Richard Grisanti
577 Niagara Street
Buffalo, New York 14201

Re: Estate of Howard R. Hughes, Jr., Deceased; No. 139,362; Probate Court No. 2; Harris County, Texas.

Dear Mr. Grisanti;

Enclosed is a copy of the judgment signed by Judge Gregory on Friday, August 30, 1985.

Sincerely,

/s/ Thomas L. Schubert

108; dt
Enclosure

Exhibit 2

BEST AVAILABLE COPY

Exhibit 3

PHILLIPS, LYTLE, HITCHCOCK, BLAINE & HUBER
ATTORNEYS AT LAW
3400 MARINE MIDLAND CENTER, BUFFALO, NEW YORK 14203
(716) 847-8400

ALEXANDER C. CORDES
PARTNER

September 5, 1985

Richard D. Grisanti, Esq.
577 Niagara Street
Buffalo, N.Y. 14201

Re: Ganoe, et al. vs. William Lummis, Temporary Administrator of the Estate of Howard Robard Hughes, Jr. and George F. Neff, Independent Executor of the Estate of Annette Gano Lummis
Index No. H 58168

Dear Dick:

Enclosed are copies of our letter to Justice Kasler of today's date and of the August 30, 1985 judgment of the Texas Probate Court.

As you know, at your request, Justice Joslin adjourned our motion to dismiss and for sanctions from September 4, 1985 until 9:30 a.m. on September 18, 1985. We hope you will not wait until September 13 to provide us with copies of any answering

papers, but will do us the courtesy of providing them at the earliest possible date.

Very truly yours,

PHILLIPS, LYTLE, HITCHCOCK, BLAINE & HUBER

/s/ Alexander Cordes

UUdr
Encs.

Richard D. Grisanti
Attorney at Law
Phone (716) 883-0400

Exhibit 4

577 Niagara Street
near Jersey
Buffalo, New York 14201

September 30, 1985

The Lovett Agency
Surety and Fidelity Bonds
815 Walker at Travis
1437 Esperson Buildings
Houston, Texas 77002

Re: Estate of Howard R. Hughes, Jr.,
Deceased Docket #139,362

Dear Sirs;

Enclosed please find duly executed Appeal Bond and Application, per your instructions, together with the total amount now due, as billed.

I am also enclosing a copy of Judge Gregory's Judgment for your persual in this matter, together with a self-stamped, addressed envelope to Ms. Anita Rodeheaver, County Clerk, 1001 Preston, 4th Floor, P.O. Box 1525, Houston, Texas 77251 so that you may send

the Bond directly to her for filing.

Your cooperation in this matter is appreciated.

Yours very truly,

/s/ Richard D. Grisanti
Attorney at Law

jmf

Enc.

BEST AVAILABLE COPY

XPRESS MAIL

POST OFFICE TO ADDRESSEE

46333305

FROM:
RICHARD D. GRISANTI, ESQ.
577 Niagara Street
Buffalo, New York 14201

ORIGIN:
Initials of Receiving Clerk: JA
P.O. ZIP: 14213
Date in: 9-30-85
Time in: 15:19
Weight: 1 lb
Postage: $10.75

SERVICE GUARANTEE:
Domestic mailings under this service made at designated USPS facilities on or before a specified deposit time will be accepted for express shipment to a designated USPS delivery area having Express Mail service for next day delivery to an addressee or agent on or before the time specified by the USPS at mailing. USPS will refund upon application to originating office the postage for any shipments mailed under this service and not meeting the service standard except for those delayed by strike or work stoppage. See USPS Notice 3 for details.

INSURANCE COVERAGE:
(1) Document Reconstruction insurance: Domestic and International Mail Non-negotiable ... are insured against loss damage or delay up to $... subject to a limit of $500,000 per occurrence. Notice 7 or Notice 63 for limitations of coverage.
(2) Merchandise ... Domestic Mail only: Parcels are insured against loss or damage ... $200. The mailer must declare the value of the article at the time of mailing. See USPS Notice 13 or Notice 63 for ... of coverage.
Claims for loss, delay or damage must be made within 60 days. Claim forms may be obtained at the post office of mailing.

TO:
The Lovett Agency
Surety & Fidelity Bonds
815 Walker at Travis
1437 Esperson Buildings
Houston, Texas 77002

Value Declared, if any:

Customer Number, if any:

EXPRESS MAIL SERVIC
Customer P

EL 118 JUNE 79 P.O. 1979—301—203

EXPRESS MAIL

Exhibit 5

Supreme Court, U.S.
FILED
MAY 2 1986
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 85-1738

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

VICTOR L. GANOE, THOMAS A. GANOE, EDWIN A. GANOE, DANIEL K. GANOE, SANDRA I. GANOE COLLAR, MARY GANOE PRICE, CHERIE GANOE LODESTRO and CLEO GANOE SMITH

Petitioners,

v.

GEORGE F. NEFF, INDEPENDENT EXECUTOR OF THE ESTATE OF ANNETTE GANO LUMMIS, DECEASED

Respondent.

On Petition for Writ of Certiorari To The Supreme Court of the State of Texas

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

James W. Dilworth
ANDREWS & KURTH
4200 Texas Commerce Tower
Houston, Texas 77002
(713)220-4200
May 1, 1986
Attorneys for Respondent George F. Neff, Executor of the Estate of Annette Gano Lummis, Deceased

Of Counsel for Respondent:
Thomas L. Schubert
ANDREWS & KURTH
4200 Texas Commerce Tower
Houston, Texas 77002
(713) 220-4200

25pp $

No. 85-1738

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

VICTOR L. GANOE, THOMAS A. GANOE,
EDWIN A. GANOE, DANIEL K. GANOE,
SANDRA I. GANOE COLLAR, MARY GANOE PRICE,
CHERIE GANOE LODESTRO and
CLEO GANOE SMITH

Petitioners,

v.

GEORGE F. NEFF, INDEPENDENT EXECUTOR
OF THE ESTATE OF ANNETTE GANO LUMMIS,
DECEASED

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The respondent George F. Neff, Administrator of the Estate of Annette Gano Lummis, Deceased, respectfully prays that this Court deny the Petition for Writ of Certiorari seeking review of the judgment of the Supreme Court of the State of Texas dismissing Petitioners' writ of error from the Court of Appeals for the First Supreme Judicial District of Texas entered in this action on February 26, 1986.

QUESTION PRESENTED

Whether the Texas Supreme Court and the Texas Court of Appeals denied Petitioners their rights under the Fifth and Fourteenth Amendments of the United States Constitution by dismissing Petitioners' appeal herein for the reason that it was untimely filed.

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Daniels v. Allen, decided sub nom. Brown v. Allen, 344 U.S. 443, 73 S. Ct. 397, 97 L. Ed. 469 (1953) 8

Farrow v. Bramble, 663 S.W.2d 893 (Tex. App. -- San Antonio 1983, no writ) 14

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OPINION BELOW

The Supreme Court of Texas dismissed Petitioners' application for writ of error on February 26, 1986, for want of jurisdiction. The case had been dismissed for want of jurisdiction on December 12, 1985 by the Court of Appeals, First Supreme Judicial District, Houston, Texas* from an appeal from the Order of Hon. Pat Gregory, Probate Court No. 2; Harris County, Texas, which was rendered August 30, 1985. Copies of these documents are attached in Appendix A.

* Petitioners cited the wrong Court of Appeals case in their Petition for Certiorari. The correct Court of Appeals Opinion is attached in Appendix A.

JURISDICTION

This Court does not have jurisdiction under the Fifth and Fourteenth Amendments to the United States Constitution as stated by Petitioners.

The Court of Appeals, First Supreme Judicial District, Houston, Texas on December 12, 1985 properly dismissed Petitioners' Appeal from Probate Court No. 2, Harris County, Texas, because that Appeal had not been timely filed. There being no jurisdiction in the Court of Appeals, the Texas Supreme Court properly dismissed Petitioners' application for writ of error. Petitioners failed to follow Texas appellate procedure and were not denied due process by the Texas Courts.

PROVISIONS OF LAW INVOLVED

Texas Rules of Civil Procedure, Rule 354(a):

COST BOND

Unless excused by law, the appellant shall execute a bond payable to the appellee in the sum of $1000 . . . .

Texas Rules of Civil Procedure, Rule 356(a) & (b):

TIME FOR PERFECTING APPEAL

(a) When a bond for costs on appeal is required, the bond or affidavit in lieu thereof shall be filed with the clerk within thirty days after the judgment is signed . . . . (Emphasis Added).

(b) An extension of time may be granted by the appellate court for late filing of a cost bond or making the deposit required by subdivision (a) or for filing the affidavit, if such bond is filed, deposit is made, or affidavit is filed within fifteen days after the last day allowed and, within the same period, a motion is filed in the appellate court reasonably explaining the need for such extension . . . .

Texas Rules of Civil Procedure, Rule 5:

ENLARGEMENT

. . . the court . . . may not enlarge the period for taking any action under the rules relating to . . . the period for taking an appeal or writ of error from the trial court to any higher court or the period for application for writ of error in the Supreme Court, except as stated in these rules; provided, however, if . . . any matter relating to taking an appeal or writ of error from the trial court to any higher court, or application for writ of error is sent to the proper clerk by first-class United States mail in an envelope or wrapper properly addressed and stamped and is deposited in the mail one day or more before the last day for filing same, the same, if received by the clerk not more than ten days tardily, shall be filed by the clerk and be deemed filed in time; . . .

Texas Rules of Civil Procedure, Rule 21a:

NOTICE

. . . Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him

by mail, three days shall be added to the prescribed period

. . . .

United States Constitution, Amendments V and XIV

. . . without due process of law . . . .

STATEMENT OF THE CASE

The judgments of the Texas Supreme Court and Court of Appeals are correct.

This is a suit in which Petitioners seek to establish an interest in the Estate of the late Howard R. Hughes, Jr. by claiming that Petitioners and Howard R. Hughes, Jr. shared a remote common ancestor -- a maternal Great Great Great Great Great Great Grandfather -- by the name of Stephen Gano born in 1652 in France. On August 30, 1985, the probate court signed and entered a judgment that Petitioners take nothing on their remote claims of heirship. Petitioners did not file a motion for new trial. Though the last date for timely filing of an appeal bond was September 30, 1985, Petitioners did not file their appeal bond with the Harris County Clerk's Office until October 2, 1985. Petitioners did not file a motion for extension of time to file their appeal bond.

Respondent filed a motion to dismiss Peititioners' appeal for want of jurisdiction with the Court of Appeals for the First Supreme Judicial District sitting in Houston. The Court of Appeals granted Respondent's motion and

dismissed the appeal, correctly holding that because Petitioners failed to file their cost bond on or before September 30, 1985, the Court of Appeals had no jurisdiction over the appeal. Petitioners did not file a motion for rehearing in the Court of Appeals.

On January 20, 1986, Petitioners filed an application for writ of error in the Texas Supreme Court. That application for writ of error was dismissed by the Supreme Court on February 26, 1986 for want of jurisdiction.

REASONS FOR DENYING THE WRIT

A. There Has Been No Denial of Due Process.

Petitioners claim that Texas courts denied them due process of law by dismissing their appeal for failure to comply with the Texas Rules of Civil Procedure. There has been no denial of due process, just a lack of diligence on the part of Petitioners. The law is clear that dismissal of an appeal on the grounds that it was not timely filed does not violate the "due process" clause of the Fourteenth Amendment. Wainwright v. Torna, 455 U.S. 586, 102 S. Ct. 1300, 71 L. Ed. 2d 475 (1982); Daniels v. Allen, decided sub nom. Brown v. Allen, 344 U.S. 443, 486, 73 S. Ct. 397, 422, 97 L. Ed. 469, 504 (1953) (filing one day late); United States ex rel. Brown v. Smith, 306 F. 2d 596, 604-606 (2d Cir. 1962); Blair v. Supreme Court of State of Wyoming, 671 F. 2d 389, 391 (10th Cir. 1982); Micelli v. LeFevre, 444 F. Supp. 1187, 1191 (S.D. N.Y. 1978); Marsh v. United States, 435 F. Supp. 426, 429 (W.D. Okla. 1976); Foye v. Bordenkircher, 535 F. Supp. 1340 (N.D. W. Va. 1982); Van Duyse v. Israel, 486 F. Supp. 1382, 1388-1389 (E. D. Wisc. 1980).

Pursuant to authority granted it by the state legislature, the Texas Supreme Court has promulgated rules of civil procedure rationally designed to ensure the fair and efficient administration of justice in Texas state courts. The rule providing a thirty day time period for filing an appeal bond is rationally designed to promote the fair and effficient administration of justice. Thus, enforcement of the rule is not unconstitutional.

B. Petitioners' Appeal Bond Not Timely Filed.

Rule 354(a) of the Texas Rules of Civil Procedure requires a party appealing to the Court of Appeals to file an appeal bond with sufficient surety. Since Petitioners did not file a motion for new trial, in order to timely perfect their appeal, Petitioners were required under Rule 356(a) of the Texas Rules of Civil Procedure to file their appeal bond within thirty days after the date the judgment was signed. After a fair trial on the merits, the Probate Court signed and filed its judgment on August 30, 1985. This made September 30, 1985 the last day upon which Petitioners' appeal bond could be timely filed. The appeal bond, as shown on its face by the clerk's date stamp, was

not filed by Petitioners until October 2, 1985. The appeal bond was not timely filed.

C. Rule 5 Enlargement Period Not Available for Petitioners.

Rule 5 of the Texas Rules of Civil Procedure[1] allows an appellant a ten day grace period for filing his appeal only if the appeal bond (i) is sent to the proper clerk by first-class U.S. mail in a properly addressed and stamped envelope deposited in the mail one day or more before the last day for filing the appeal bond and (ii) is received by the clerk not more than ten days tardily. Petitioners are unable to avail themselves of this additional ten day period because the appeal bond was neither sent to nor received by the clerk via the U.S. mails. Instead, the appeal bond was delivered by private courier. Rule 5

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[1] In their petition for certiorari, Petitioners have quoted an irrelevant portion of Rule 5 and have left out the only relevant parts. The portion they cite does not apply in appeals cases. The relevant portion of the rule is set forth in Respondent's Provisions of Law Involved, p. 3.

strictly requires that the U.S. mails be used, just as the Supreme Court requires that the U.S. mails be used to comply with Supreme Court Rule 28.2. Petitioners' hand delivery was too late and was properly held not to come within the rule.

D. Rule 21(a) Does Not Afford Additional Time to File an Appeal Bond.

Petitioners' contention that Rule 21(a) of the Texas Rules of Civil Procedure affords them three additional days to file their appeal bond is wholly without merit. Rule 21(a) applies only when a party must take some act within a prescribed time period after receipt of a notice or other paper served on him. Tex. R. Civ. P. 21(a). Under Rule 356(a), an appellant's time to file an appeal bond does not run from his receipt of a notice or other paper, but rather from the date the trial court's judgment is signed. Tex. R. Civ. P. 356(a). It is therefore clear that Petitioners' reliance on the general notice rule, Rule 21(a), is misplaced. Although actual notice of the date of signing is irrelevant, Petitioners' attorney, Richard D. Grisanti, did receive a letter from counsel for Respondent, Thomas L. Schubert, dated September 4, 1985 which specifically stated that the Probate Court judgment was signed by

Judge Gregory on August 30, 1985. Appendix B. Thus, Petitioners actually knew when the judgment was signed at least 25 days before the appeal bond was due, and Petitioners' failure to follow the Texas Rules was inexcusable, and no excuse has been proffered.

E. Petitioners Failed to File a Motion for Extension of Time.

Rule 356(b) of the Texas Rules of Civil Procedure provides that an extension of time may be granted by a court of appeals for the late filing of an appeal bond only if the bond and a motion reasonably explaining the need for a time extension are filed with the court of appeals within fifteen days after the last day allowed for filing the appeal bond. Since the last day for filing an appeal bond was September 30, 1985, the last day for filing a motion for extension of time was October 15, 1985, and no such motion was filed by that date or ever. Petitioners' failure to timely file the bond or move for an extension within said fifteen day period returns Petitioners to the original time limits of Rule 356(a), which time limits are jurisdictional under Texas law. Grajeda v. Charm Homes, Inc., 614 S. W. 2d 176, 177 (Tex. Civ. App. -- El Paso 1981, no writ).

F. Petitioners' Failure to Timely File Appeal Bond is Jurisdictional Defect.

It is well settled in Texas law that it is incumbent upon the appellant to make absolutely sure that the appeal bond has been timely filed, or be able to show that it was timely placed in the U.S. mails. Gaskin v. Perritt, 472 S.W. 2d 211 (Tex. Civ. App. -- Texarkana 1971, no writ). In addition, the timely filing of the appeal bond must affirmatively appear from the record. Heard v. Heard, 305 S.W. 2d 231, 234 (Tex. Civ. App. -- Galveston 1957, writ ref'd).

The timely filing of Petitioners' appeal bond is mandatory and jurisdictional under Texas law. Glidden Co. v. Aetna Casualty and Surety Co., 155 Tex. 591, 291 S.W. 2d 315, 318 (1956); Young v. Kilroy Oil Co. of Texas, Inc., 673 S.W. 2d 236 (Tex. App. -- Houston [1st Dist.] 1984, writ ref'd n.r.e.). The failure to file timely an appeal bond creates a jurisdictional defect in the appeal, Texas Employers' Ins. Assoc. v. Martin, 162 Tex. 376, 347 S.W. 2d 916 (Tex. 1961); Zidell v. NHP Real Estate Co., 643 S.W. 2d 199, 200 (Tex. App. -- Austin 1982, no writ); Pridgen v. Damon, 298 S.W. 2d 278 (Tex. Civ. App. -- Austin 1957, writ ref'd), and requires the dismissal of the

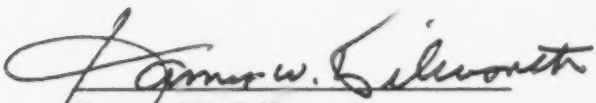
appeal. Farrow v. Bamble, 663 S.W. 2d 893 (Tex. App. -- San Antonio 1983, no writ); Lucchese v. Specia, 281 S.W. 2d 725, 726 (Tex. Civ. App. -- San Antonio 1955, writ ref'd).

In dismissing Petitioners' appeal for want of jurisdiction, the Texas Court of Appeals and the Texas Supreme Court simply applied the Texas Rules of Civil Procedure as they are written and clearly applied by the Courts. The rules of appellate procedure are strictly applied, and they affect all appellants alike. Petitioners' complete disregard of the Texas appellate procedure brings no constitutional issue before this Court.

CONCLUSION

Respondent respectfully submits that this case is not a proper one for review by certiorari in the Supreme Court of the United States, and Respondent prays that the petition for Writ of Certiorari be denied.

Respectfully submitted,



James W. Dilworth
ANDREWS & KURTH
4200 Texas Commerce Tower
Houston, Texas 77002
(713) 220-4200

Attorneys for Respondent
George F. Neff, Executor
of the Estate
of Annette Gano Lummis,
Deceased

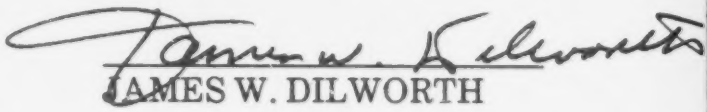
Of Counsel for Respondent:
Thomas L. Schubert
ANDREWS & KURTH
4200 Texas Commerce Tower
Houston, Texas 77002
(713) 220-4200

PROOF OF SERVICE

James W. Dilworth, Andrews & Kurth, deposes and states that pursuant to Rule 28.3 of this Court he served this Brief in Opposition to Writ of Certiorari on the Petitioners by enclosing three copies of each thereof in an envelope, certified mail, return receipt requested, addressed to:

Richard D. Grisanti
577 Niagara Street
Buffalo, New York 14201

and depositing the same in the United States mails at Houston, Texas on the 1st day of May, 1986.



JAMES W. DILWORTH

APPENDIX A

P.O. BOX 12248
Supreme Court Building
Austin, Texas 78711
Mary M. Wakefield, Clerk

February 26, 1986

Mr. Richard D. Grisanti
577 Niagara Street
Buffalo NY 14201

Mr. Thomas L. Schubert
Andrews & Kurth
4200 Texas Commerce Tower
Houston TX 77002

RE: Case No. C-4953

STYLE: VICTOR L. GANOE ET AL.
v. GEORGE F. NEFF, INDEPENDENT EXECUTOR OF THE ESTATE OF

Dear Counsel:

Today, the Supreme Court of Texas dismissed for want of jurisdiction the application for writ of error in the above referenced case.

Respectfully yours,

Mary M. Wakefield, Clerk

By Blanca E. Trevino
Deputy

BEST AVAILABLE COPY

COPY OF JUDGMENT

VICTOR L. GANOE, THOMAS A. GANOE, EDWIN A. GANOE, DANIEL K. GANOE, SANDRA I. GANOE COLLAR, MARY GANOE PRICE, CHERIE GANOE LODESTRO, AND CLEO GANOE SMITH, APPELLANTS

Appeal from the Probate Court No. 2 of Harris Cty, Tx. (Tr. Ct. No. 139,362).

NO. 01-85-0896-CV V.

GEORGE F. NEFF, INDEPENDENT EXECUTOR OF THE ESTATE OF ANNETTE GANO LUMMIS, DECEASED, APPELLEE

On this day came on to be considered the appellee's motion to dismiss, and the same having been duly considered and found meritorious, it is therefore **CONSIDERED, ADJUDGED AND ORDERED** that said motion be granted, and that the appeal herein be, and the same hereby is, dismissed.

It is further ordered that the appellants, VICTOR L. GANOE, THOMAS A. GANOE, EDWIN A. GANOE, DANIEL K. GANOE, SANDRA I. GANOE COLLAR, MARY GANOE PRICE, CHERIE GANOE LODESTRO, AND CLEO GANOE SMITH, and their surety, LAWYERS SURETY CORPORATION, jointly and severally, pay all costs incurred by reason of this appeal.

It is further ordered that this decision be certified below for observance.

Judgment rendered by panel consisting of Associate Justices Smith, Duggan, and Hoyt.

JDGGAN.JN

OPINION

VICTOR L. GANOE, THOMAS A. GANOE, EDWIN A. GANOE, DANIEL K. GANOE, SANDRA I. GANOE COLLAR, MARY GANOE PRICE, CHERIE GANOE LODESTRO, AND CLEO GANOE SMITH, APPELLANTS

NO. 01-85-0896-CV V.

GEORGE F. NEFF, INDEPENDENT EXECUTOR OF THE ESTATE OF ANNETTE GANO LUMMIS, DECEASED, APPELLEE

On Appeal from the Probate Court No. 2 of Harris County, Texas
Trial Court Cause No. 139,362

BEST AVAILABLE COPY

This is an appeal from a suit to establish an interest in the estate of the late Howard R. Hughes, Jr. Appellee has filed a motion to dismiss for want of jurisdiction.

The judgment was signed on August 30, 1985, and no motion for new trial was filed. In order to perfect the appeal, the cost bond was due to be filed on September 30, 1985. Tex. R. Civ. P. 356(a). The bond was filed on October 2, 1985. No motion for extension of time to file the cost bond was filed. Rule 356(b).

In the absence of a properly filed cost bond, we may only dismiss the appeal. See, e.g., Young v. Kilroy Oil Co. of Texas, 673 S.W.2d 236 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.).

The appellee's motion is granted, and the appeal is dismissed.

PER CURIAM

Panel consists of Associate Justices Smith, Duggan, and Hoyt.

No publication. Tex. R. Civ. P. 452.

OPGAN.KE

Judgment rendered and opinion filed December 12, 1985.

A TRUE COPY ATTEST:

Kathryn Cox
Clerk of the Court

442837

PROBATE COURT NO. 2

NO. 139,382

IN RE ESTATE OF	§	IN THE PROBATE	665-01-0930
	§		
HOWARD R. HUGHES, JR.	§	COURT NO. 2	
	§		
DECEASED	§	OF HARRIS COUNTY, TEXAS	

JUDGMENT

BE IT REMEMBERED that on the 2nd day of August, 1985, came on to be heard the Motion to Set Aside Determination of Heirship filed on behalf of Movants, Victor L. Ganoe, Thomas A. Ganoe, Edwin A. Ganoe, Daniel K. Ganoe, Sandra L Ganoe Collar, Mary Ganoe Price, Cherie Ganoe LoDestro and Cleo Ganoe Smith, all of whom appeared by and through their attorney of record, Mr. Richard D. Grisanti, and Victor L. Ganoe appeared personally and further came the Respondent, George F. Neff, Independent Executor of the Estate of Annette Gano Lummis, Deceased, by and through his attorney of record;

And the Court after considering the motion as well as the response thereto including affidavits, responses to interrogatories, responses to requests for admissions, briefs and arguments of counsel and the entire record in this cause, finds that the Movants had actual notice of the Texas heirship trial and that the Movants did not receive statutory notice of the Texas heirship trial;

Accordingly, the Court orders that the maternal heirship proceeding be re-opened for the sole and limited purpose only of determining whether the Movants have a claim under the Texas heirship statutes that is superior to those persons previously determined to be maternal heirs in this Court's Judgment respecting heirship dated November 13, 1981.

BEST AVAILABLE COPY

CERTIFIED COPY CERTIFICATE
STATE OF TEXAS
COUNTY OF HARRIS

The above is a full, true and correct photographic copy of the original record now in my lawful custody and possession, as the same is recorded in the Official Public Records of Probate Courts in my office and Preserved on Microfilm, and having Microfilm Identification Number as stamped thereon. I hereby certify on

SEP 3 1965

ANITA RODEHEAVER
COUNTY CLERK
HARRIS COUNTY, TEXAS
By Karen Harrison
Deputy

KAREN HARRISON

665-01-C931

And further then came on to be heard the Motion for Summary Judgment filed by George F. Neff, Independent Executor of the Estate of Annette Gano Lummis, Deceased, against Victor L. Ganoe, Thomas A. Ganoe, Edwin A. Ganoe, Daniel K. Ganoe, Sandra I. Ganoe Collar, Mary Ganoe Price, Cherie Ganoe LoDestro and Cleo Ganoe Smith regarding their claim of heirship;

It appearing to the Court that the motion for summary judgment having been made in proper form and time and that proper service of said motion has been made, and the Court having considered the summary judgment proof herein including the motion, reply thereto, the response to the reply, the pleadings, the depositions, answers to interrogatories, admissions and affidavits on file herein as well as the argument of counsel, the Court finds and concludes that there is no genuine issue of any material fact and that movant is entitled to judgment as a matter of law.

It is therefore ORDERED, ADJUDGED AND DECREED that Victor L. Ganoe, Thomas A. Ganoe, Edwin A. Ganoe, Daniel K. Ganoe, Sandra I. Ganoe Collar, Mary Ganoe Price, Cherie Ganoe LoDestro and Cleo Ganoe Smith take nothing on their claims of heirship, and costs applicable to such claims are hereby taxed against them.

SIGNED this the 30 day of August, 1985.

JUDGE PRESIDING

APPROVED AS TO FORM ONLY:

RICHARD D. GRISANTI
577 Niagara Street
Buffalo, New York 14201

ATTORNEY FOR GANOES

FILED
1985 AUG 30 AM 9:33
COUNTY CLERK
HARRIS COUNTY, TEXAS

-2-

CERTIFIED COPY CERTIFICATE
STATE OF TEXAS
COUNTY OF HARRIS

The above is a full, true and correct photographic copy of the original record now in my lawful custody and possession, as the same is recorded in the Official Public Records of Probate Courts in my office and Preserved on Microfilm, and having Microfilm Identification Number as stamped thereon. I hereby certify on

SEP 3 1965

ANITA RODEHEAVER
COUNTY CLERK
HARRIS COUNTY, TEXAS
By Karen Harrison
Deputy

KAREN HARRISON

BEST AVAILABLE COPY

655-01-0952

Thomas L. Schubert

THOMAS L. SCHUBERT
TBA No. 17821000
Andrews & Kurth
4200 Texas Commerce Tower
Houston, Texas 77002

ATTORNEYS FOR GEORGE F. NEFF,
Independent Executor of the
Estate of Annette Gano Lummis, Deceased

BEST AVAILABLE COPY

CERTIFIED COPY CERTIFICATE
STATE OF TEXAS
COUNTY OF HARRIS

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SEP 3 1985

COUNTY COURT OF HARRIS COUNTY, TEXAS

ANITA RODEHEAVER
COUNTY CLERK
HARRIS COUNTY, TEXAS
By Karen Harrison
Deputy

KAREN HARRISON